Pengarah Kastam Negeri Johor & Anor v Kedai Makan Kebun Teh (Sutera Utama) Sdn Bhd & Ors and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS J-01–457–10 OF 2012 AND J-01–458–10 OF 2012
ALIZATUL KHAIR, HAMID SULTAN AND ABANG ISKANDAR JJCA
4 APRIL 2014

Administrative Law — Judicial review — Application for — Whether improper to resort to judicial review when internal statutory remedy to redress grievance exists

Administrative Law — Judicial review — Application for leave — Delay — Application for leave filed out of time — Breach of mandatory requirement — No application for extension of time — No explanation offered for delay — Abuse of process of court — Rules of the High Court 1980 O 53

The High Court had granted leave to the respondents to mount a challenge against the decision of the first appellant on a sales tax matter by way of judicial review application. During the leave application hearing, the attorney general had raised the following objections: (i) that the application for leave (*lampiran* 1) was filed out of time; and (ii) that the respondent had not exhausted the internal remedy that was available to redress its grievance caused by the decision of the appellants. The objections were overruled by the learned trial judge who had allowed leave to be granted to the respondent to proceed with its judicial review. The appellants appealed against that decision.

Held, allowing the appeal with costs:

(1) The application in *lampiran* 1 was made under the old Rules of the High Court 1980 whereby the stipulated time-frame for an aggrieved party to file his application under O 53 of the Rules of the High Court 1980 ('RHC') was set at 40 days from the date on which the impugned decision was first communicated to him or from the date when the grounds for the application first arose. On the facts of this case, the notice was only first communicated to the respondent on 12 April 2012. The respondent then filed *lampiran* 1 on 25 May 2012. It was filed outside the stipulated time-frame of 40 days and had therefore breached the mandatory requirement under O 53 of the RHC (see paras 8 & 12).

(2) There was no application made by the respondent to extend time to regularize the breach. Neither was there any explanation offered by the respondent as to why there had been a delay and a non-compliance of the

express provision on time. Delay per se, may be innocuous but its occurrence, whatever its period, must be explained away by the party in whose interest it is to have it excused by making the necessary application to the court. *lampiran* 1 was therefore an abuse of the process of court and ought therefore to be dismissed (see para 13).

(3) The respondent also ought not be granted leave in the circumstances of this case because it had not exhausted its statutory remedy as provided for under s 68 of the Sales Tax Act 1972 to the Director-General of Customs (see para 16).

(4) Where a statute has provided for a further internal remedy to an aggrieved party, then it would become incumbent that recourse must first be had to that grievance mechanism. In other words, the respondent is statutorily obliged to exhaust that remedy first before running, as it were, to the courts for what is essentially a discretionary relief (see para 19).

[Bahasa Malaysia summary

Mahkamah Tinggi telah memberi keizinan kepada responden-responden untuk memulakan bantahan terhadap keputusan perayu pertama atas perkara cukai jualan melalui permohonan semakan kehakiman. Semasa pendengaran permohonan izin, peguam negara telah membangkitkan bantahan berikut: (i) bahawa permohonan untuk izin (lampiran 1) difailkan di luar masa; dan (ii) bahawa responden tidak menggunakan remedi dalaman yang sedia ada untuk memperbetulkan rasa tidak puas hati disebabkan oleh keputusan perayu-perayu. Bantahan ditolak oleh hakim perbicaraan yang membenarkan izin diberikan kepada responden-responden untuk meneruskan dengan semakan kehakimannya. Perayu-perayu merayu terhadap keputusan tersebut.

Diputuskan, membenarkan rayuan dengan kos:

(1) Permohonan dalam lampiran 1 dibuat di bawah Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') di mana rangka masa yang ditetapkan untuk pihak yang tidak puas hati memfailkan permohonannya di bawah A 53 ditetapkan pada 40 hari dari tarikh di mana keputusan yang dipersoalkan tersebut pertama kali diberitahu kepadanya atau dari tarikh apabila alasan-alasan untuk permohonan berbangkit pada pertama kalinya. Atas fakta kes ini, notis hanya pertama kali diberitahu kepada rsponden pada 12 April 2012. Responden kemudiannya memfailkan lampiran 1 pada 25 Mei 2012. Ia difailkan di luar rangka masa yang ditetapkan selama 40 hari dan oleh itu memungkiri keperluan mandatori di bawah A 53 KMT (lihat perenggan 8 & 12).

(2) Tidak terdapat permohonan yang dibuat oleh responden untuk melanjutkan masa bagi memulihkan kemungkiran. Tidak terdapat penjelasan yang diberikan oleh responden mengapa terdapat kelewatan dan ketidakpatuhan terhadap peruntukan nyata untuk masa. Kelewatan

itu sendiri, mungkin tidak berbahaya tetapi terjadinya, apa pun tempohnya, mesti dijelaskan oleh pihak yang kepentingannya adalah untuk membuatkannya dikecualikan dengan membuat permohonan yang perlu kepada mahkamah. Lampiran 1 oleh itu adalah penyalahgunaan proses mahkamah dan patut ditolak (lihat perenggan 13).

(3) Responden juga patut tidak diberikan izin dalam keadaan kes ini kerana ia tidak mengunakan remedi statutorinya seperti yang diperuntukkan di bawah s 68 Akta Cukai Jualan 1972 kepada Ketua Pengarah Kastam (lihat perenggan 16).

(4) Di mana statut telah memperuntukkan untuk remedi dalaman selanjutnya kepada pihak yang tidak berpuas hati, oleh itu akan menjadi wajib bahawa jalan keluar mesti diperolehi terlebih dahulu kepada mekanisme tidak puas hati tersebut. Dalam erti kata lain, responden bertanggungjawab secara statutori untuk menggunakan remedi tersebut terlebih dahulu sebelum memohon kepada mahkamah untuk pada dasarnya relief budi bicara (lihat perenggan 19).]

Notes

For cases on application for judicial review, see 1(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 288–353.

Cases referred to

Abdul Rahman bin Abdullah Munir & Ors v Datuk Bandar Kuala Lumpur & Anor [2008] 6 MLJ 704, CA (refd)

Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Others [2010] 3 MLJ 145, FC (refd)

Government of Malaysia & Anor v Jagdis Singh [1987] 2 MLJ 185, SC (folld)

Manggai v Government of Sarawak & Anor [1970] 2 MLJ 41, FC (folld)

Members of the Commission of Enquiry on the Video Clip Recording Images of A Person Purported to be an Advocate and Solicitor Speaking on Telephone on Matters of Appointment of Judges v Tun Dato' Seri Ahmad Fairuz bin Dato' Sheikh Abdul Halim [2011] 6 MLJ 490, FC (refd)

Menteri Besar Pahang Darul Makmur & Ors v Seruan Gemilang Makmur Sdn Bhd [2010] 4 MLJ 360; [2010] 5 CLJ 123, CA (refd)

Ong Guan Teck v Hijjas [1982] 1 MLJ 105 (refd)

Preston, Re [1985] AC 835, CA (folld)

Robin Tan Pang Heng @ Muhammad Rizal bin Abdullah (suing as public officer at Penang Turf Club) v Ketua Pengarah Sekerja Malaysia & Anor [2011] 2 MLJ 457; [2010] 9 CLJ 505, FC (folld)

Tengku Anoomshah bin Tengku Zainal Abidin & Anor v Collector of Land Revenue, North-East District, Penang [1995] MLJU 410; [1995] 3 CLJ 434, HC (refd)

Legislation referred to

Customs Act 1967 s 141N
Rules of the High Court 1980 O 53, O 53 r 3(6)
Sales Tax Act 1972 s 68

Lee Chee Thim (State Legal Advisor, Johor Legal Advisor Offices) for the appellants.
Lau Kok Guan (Noor Liana bt Hashim with him) (Lau Kok Guan & Associate) for the respondents.

Abang Iskandar JCA (delivering judgment of the court):

[1] These are appeals filed by the attorney general's chambers on behalf of the appellants, against the decision of the learned trial judge sitting in Johor Bahru High Court who had granted leave to the respondents (taxpayers) to mount a challenge against the decision of the first appellant on a sales tax matter by way of judicial review application. If that challenge were to prove successful at the substantive hearing, the impugned decision will invariably be quashed by the High Court issuing a certiorari to that effect.

[2] The grievance on the part of the respondents (taxpayers) was caused by the notice dated 9 April 2012 which had stated that the taxpayers were liable to pay sales tax for the years 2010 and 2011 (combined) and the attendant penalty imposed by the first appellant Pengarah Kastam Negeri Johor. The disputed amount was RM700,140.30. The appeal for case No J-01–458–10 of 2012 was heard together before us with case No J-01–457–10 of 2012 and it was agreed by parties that the decision in the former case would bind the latter case, *mutatis mutandis*.

[3] At the outset, this appeal was concerned not on the merits or otherwise of the amount that was being claimed by the appellants and that was being disputed by the respondents (taxpayers). Rather, this appeal had arisen due to the objections that were raised by the attorney general during the leave application hearing and which objections had been overruled by the learned trial judge who had allowed leave to be granted to the respondent taxpayer to proceed with its judicial review of the impugned decision contained in the said notice dated 9 April 2012.

[4] This appeal was founded on two issues. First, it was submitted by learned senior federal counsel ('the SFC') that the application for leave (*lampiran* 1) was filed out of time. Secondly, it was contended by the SFC too, that the respondent taxpayer had not exhausted the internal remedy that was available to redress its grievance caused by the decision of the appellants.

[5] We had occasion to hear the able submissions by both parties during the

course of the appeal hearing and we had also occasion to read the materials placed before us for our due consideration.

[6] Having done so, we were of the view that this appeal ought to be allowed and we had indeed so ordered. We now proffer our reasons for having done so.

[7] On the first ground of appeal, namely the fact that the respondent taxpayer was out of time when it had filed this application, we are in agreement with the learned SFC that the requirements that needed to be complied with by the applicant were mandatory in nature and must be adhered to strictly by an applicant desirous of obtaining leave for judicial review.

[8] It must be noted that this application was made under the old Rules of the High Court 1980 whereby the stipulated time-frame for an aggrieved party to file his application under O 53 was set at 40 days from the date on which the impugned decision was first communicated to him or from the date when the grounds for the application first arose (see O 53 r (3)6 of the RHC 1980).

[9] The law in this regard is trite. Granted that the threshold upon which leave may be granted is not necessarily high, nevertheless adherence to its stated requirements as contained in O 53 have been strictly enforced by the courts. We are aware that the threshold requirement for leave to issue had been reiterated in the case of *Members of the Commission of Enquiry on the Video Clip Recording Images of A Person Purported to be an Advocate and Solicitor Speaking on Telephone on Matters of Appointment of Judges v Tun Dato' Seri Ahmad Fairuz bin Dato' Sheikh Abdul Halim* [2011] 6 MLJ 490 in that in order to be successful, the application must not be one that is frivolous or vexatious and that it justifies further argument on the substantive motion.

[10] On the matter of strict observance of the requirements of O 53, with respect, we need only to refer to the case of *Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Others* [2010] 3 MLJ 145. That case had stated clearly the rationale for the strict compliance of the express requirements of O 53. The apex court in that case, through the judgment of the learned Justice James Foong FCJ had this to say:

> The stringent conditions imposed by O 53 of the RHC are intended to protect those entrusted with the enforcement of public duties against groundless harassment and to reduce delays in resolving applications in the interest of good administration. In the instant case, the appellant was clearly handicapped, inter alia, through limitation of time, in applying for judicial review under O 53 r 3(6) of the RHC. Order 53 of the RHC sets out a specific procedure for an aggrieved party seeking relief against a public authority concerning an infringed right protected under public law. When such an explicit procedure is created, then as a general rule all applications for such

relief must adhere to the procedure prescribed under O 53 of the RHC, failing which the applications would be liable to be struck off for abuse of the process of court.

[11] The courts have been consistent in pursuing this approach as could be seen in the decision of the Court of Appeal in the case of *Menteri Besar Pahang Darul Makmur & Ors v Seruan Gemilang Makmur Sdn Bhd* [2010] 4 MLJ 360; [2010] 5 CLJ 123. In fact, in *Seruan Gemilang*, it was stated by Justice Zaleha Zahari JCA (as she then was) that 'compliance with the time frame prescribed by the rules is fundamental as it goes to jurisdiction.' Thus the need for rigid adherence to the express dictates of O 53 of the RHC 1980.

[12] We noted too that, on the facts before us, the notice in this case though dated 9 April 2012, was only first communicated to the respondent taxpayer on the 12 April 2012. Being aggrieved by the said notice, the respondent taxpayer then filed in the Johor Bahru High Court its application (*lampiran* 1) under O 53 of the RHC 1980 on the 25 May 2012. The learned SFC had taken issue on account of the fact that it was filed outside of or beyond the stipulated time-frame of 40 days. It was in fact filed three days late and had therefore breached the mandatory requirement under O 53 of the RHC 1980.

[13] It could be argued that the delay was merely three days as opposed to a situation where the delay was for a longer period. Again it was noted that there was no application to the aforesaid court made by the respondent taxpayer to extend time to regularise the breach. Neither was there any explanation offered by the respondent taxpayer as to why there had been a delay and a non-compliance of the express provision on time. The law in such a situation is clear. Delay per se, may be innocuous but its occurrence, whatever its period, must be explained away by the party in whose interest it is to have it excused by making the necessary application to the court. Learned SFC had referred to us to the case of *Abdul Rahman bin Abdullah Munir & Ors v Datuk Bandar Kuala Lumpur & Anor* [2008] 6 MLJ 704 where it was held at para 66 that jurisdiction may only be exercised upon obligatory compliance with the imperative requirement of time set out under O 53 r 3 of the RHC 1980. In that case, similarly, the appellants had not applied for an extension of time nor did they offer any explanation for the delay. The learned Justice Abdull Hamid Embong JCA (as he then was) speaking for the Court of Appeal dismissed the appeal by the applicants who had failed to apply for an extension of time to file the application for leave. To our mind, the learned Justice Vincent Ng described the legal proposition aptly when he had ruled, in the case of *Tengku Anoomshah bin Tengku Zainal Abidin & Anor v Collector of Land Revenue, North-East District, Penang* [1995] MLJU 410; [1995] 3 CLJ 434 as follows:

> However, the words 'or, Except where the delay is accounted for to the satisfaction of the court or judge to whom the application for leave is made' in O 53 r 1A, which deals with the applications, would sufficiently clothe the court with power to extend time to enable the aggrieved party to apply for leave to issue an order of certiorari. But though the court has an unfettered discretion to grant or refuse an extension of time, the rules of court must prima facie be obeyed; and in order to justify an extension of time, there must be some material on which the court can exercise its discretion in favour of the applicant.

[14] The rationale for such a ruling was proffered in the case of *Ong Guan Teck v Hijjas* [1982] 1 MLJ 105 in that if such was not the case, then the party in breach of the rules would have the unfettered right to extension of time which then would defeat the very purpose and object of the rules on limitation of period.

[15] On the facts of this case before us, clearly the respondent taxpayer had failed to comply with the time stipulation as contained in O 53 of the RHC 1980 and we agree that there was merit in the objections as raised by learned SFC in that regard. As there was no application before the learned trial judge in Johor Bahru for an extension of time to abridge time that had lapsed, we respectfully would agree with learned SFC that the learned trial judge in Johor Bahru was therefore not properly clothed with the threshold jurisdiction to entertain this application in the first place. *Lampiran* 1 is therefore an abuse of the process of court and ought therefore to be dismissed. On that ground alone, this appeal ought to succeed.

[16] Be that as it may, we are of the respectful view that the respondent taxpayer also ought not be granted leave in the circumstances of this case because it had not exhausted its statutory remedy as provided for under s 68 of the Sales Tax Act 1972 to the Director General of Customs, which provides as follows:

> 68 Disputes and appeals. (1) Where any person disputes the decision of a proper officer acting in the course of duty under section 3 he may appeal therefrom to the Director General, whose decision on such dispute shall, subject to subsection (2), be final.

[17] It was contended by the respondent taxpayer that s 141N of the Customs Act 1967 enabled it to go to court and file the prerogative writ to quash the impugned notice. That section provides as follows:

(1) Where an appeal is lodged with the Tribunal and the appeal is within the jurisdiction of the Tribunal, the issues in dispute in such appeal, whether as shown in the initial appeal or as emerging in the course of the hearing, shall not be the subject of proceedings between the same parties in any court unless.

(a) the proceedings before the court were commenced before the appeal was lodged with the Tribunal; or

(b) the appeal before the Tribunal is withdrawn, abandoned or struck out.

(2) Where paragraph (1)(a) applies, the issues in dispute in the appeal to which those proceedings relate, whether as shown in the initial appeal or as emerging in the course of the hearing, shall not be the subject of proceedings between the same parties before the Tribunal unless the appeal before the court is withdrawn, abandoned or struck out.

[18] Having perused that provision, we would agree with learned SFC that such recourse could only be had after the respondent taxpayer had exhausted the available remedy as provided for by Parliament within the four corners of the Sales Tax Act 1972. That would necessarily mean that the respondent taxpayer must have exhausted its appeal remedy with the Director General of Customs in respect of the impugned Notice as envisaged under s 68 of the Sales Tax Act 1972. While s 141N seems to suggest that the aggrieved party may go to the High Court, it does not expressly say that the aggrieved taxpayer may do so without first exhausting its remedy by appealing to the Director General.

[19] Again, with regard to the statutory remedy as contained under s 68 of the Sales Tax Act 1972 we are of the view that the position in such a case is rather trite. This court is guided by a slew of cases emanating from high authority such as *Manggai v Government of Sarawak & Anor* [1970] 2 MLJ 41, *Government of Malaysia & Anor v Jagdis Singh* [1987] 2 MLJ 185, and *Robin Tan Pang Heng @ Muhammad Rizal bin Abdullah (suing as public officer at Penang Turf Club) v Ketua Pengarah Sekerja Malaysia & Anor* [2011] 2 MLJ 457; [2010] 9 CLJ 505. These cases have decided that where a statute has provided for a further internal remedy to an aggrieved party, then it would become incumbent that recourse must first be had to that grievance mechanism. In other words, the respondent is statutorily obliged to exhaust that remedy first before running, as it were, to the courts for what is essentially a discretionary relief. The apex court in the *Robin Tan*'s case was guided by what Lord Templeman had said in the *Re Preston* [1985] AC 835 to the following effect:

Judicial review process should not be allowed to supplant the normal statutory appeal procedure.

[20] The respondent taxpayer had invited the court to do just the opposite of what was stated by Lord Templeman and with respect, such invitation ought

not to be accepted by the court. As such, we see no merit in the argument by the respondent taxpayer pertaining to s 141N of the Customs Act 1967. It cannot be employed to bypass what has been provided under s 68 of the Sales Tax Act 1972. There is no escaping compliance with the statutory appeal process to the Director General of Customs by the aggrieved party as provided thereunder.

[21] Premised on the above, we had allowed the appeal before us. In the upshot, the orders made by the learned judge in the Johor Bahru High Court in allowing leave to be granted to both the respondent taxpayers in both cases were accordingly set aside. We awarded costs to the appellants in the sum of RM3,000 in each appeal.

Appeal allowed with costs.

Reported by Kanesh Sundrum